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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE G. FLORES,

Defendant and Appellant.

2d Crim. No. B203966
(Super. Ct. No. PA054007)
(Los Angeles County)

Jose G. Flores appeals from judgment after conviction by jury of robbery (Pen. Code, § 211),¹ extortion (§ 520) and possession of a firearm by a felon (§ 12021, subd. (a)(1)). The jury found true allegations that all three crimes were committed for the benefit of a street gang (§ 186.22, subd. (b)(1)(A) & (C)), that appellant personally used a firearm in commission of the robbery and the extortion (§§ 12022.53, subd. (b), 12022.5, subd. (a)(1)), that a principal personally used a firearm in commission of the robbery (§ 12022.53, subds. (b) & (e)(1)), and that appellant suffered a prior robbery conviction in Arizona (§§ 667, subds. (a) & (b)-(i), 1170.12, subds. (a)-(d), 1192.7). The trial court found that the prior Arizona robbery constituted a serious felony within the meaning of California's Three Strikes law and section 667, subdivision (a).

¹ All statutory references are to the Penal Code.

For the extortion, the court imposed a term of 24 years to life in prison consisting of 7 years to life (§ 186.22, subd. (b)(4)(C)), doubled for the strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), plus an upper term of 10 years for personal use of a firearm (§ 12022.5, subd. (a)). For the robbery, the court imposed, but stayed pursuant to section 654, a term of 32 years in prison consisting of a 6-year upper term (§§ 211, 213) doubled for the strike, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)) and 10 years for appellant's personal use of a firearm (§ 12022.53, subd. (b)). For possession of a firearm by a felon, the court imposed, but stayed pursuant to section 654, a term of 10 years in prison consisting of a 3-year upper term (§ 12021, subd. (a)(1)) doubled for the strike and a 4-year upper term for the gang enhancement (§ 186.22, subd. (b)(1)(A)). Finally, the court imposed a five-year enhancement pursuant to section 667, subdivision (a). By statute, this five-year enhancement must run consecutive, but the clerk's minute order states that it is to run concurrent.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and Anthony Campos are members of the San Fer criminal street gang. Across appellant's face are tattooed the words, "SAN FER," "Fuck Authority," and "Los Youngsters." "Los Youngsters" is a clique within the San Fer gang.

Campos rented a commercial office space from Thomas Patrick. Patrick allowed police to search the office. This upset Campos. One Sunday morning at 4:00 a.m., appellant and Campos knocked on the door of Patrick's mobile home. Patrick woke up, recognized Campos and let both men in.

Appellant and Campos demanded money from Patrick. They each had semiautomatic handguns. They did not point the guns at Patrick, but told him that it "would not be pretty" if he did not comply with their demands. Patrick was afraid that they would shoot him. Over the course of nine hours, Patrick gave the men \$700 in cash and his Corvette. They wanted more and suggested that he take out a loan secured by his mobile home, but Patrick was unable to do so on a Sunday.

As part of an unrelated investigation, Los Angeles Police Department officers were monitoring appellant's telephone calls that day and on the following day.

The prosecution played for the jury recordings of various telephone conversations appellant had with a roommate, three women and Campos. In those conversations, appellant referred to his crimes and said that he had Patrick begging for his life. He said that he and Campos would be giving part of the proceeds of the sale of the Corvette to "the big homie."

Two days after the incident, police interviewed Patrick. The prosecution played for the jury a video recording of this interview. Patrick told the officers that each of the men had a gun and that they demanded money from him. He gave them his money and car because he was afraid he would be shot.

At trial, Patrick testified that appellant and Campos did not "actually brandish" the guns. He said that they laid one gun out on the table in his home and showed him another when they went out to one of their cars. At trial Patrick could not recall which of the men had the gun inside his home or which man showed a gun to him in the car. Patrick had memory problems following surgery for a brain tumor.

A Los Angeles police officer testified that he had monitored the San Fer gang for more than five years and that appellant and Campos were known members. He interpreted appellant's recorded statement to his roommate that "[w]e'll only give a thousand [of proceeds from the sale of the Corvette] for the big homie" to mean that they would pay a \$1,000 to a member of the Mexican Mafia. This payment would enhance the San Fer gang's reputation with the Mexican Mafia as a good earner, would earn San Fer respect and credit for later favors, and would show loyalty. In response to a hypothetical question based on the facts of the case, the officer stated his opinion that the crime was committed for the benefit of a street gang.

In the first phase of the bifurcated trial, the jury found that appellant was guilty of robbery, extortion and being a felon in possession of a firearm and found the special allegations true. In the second phase, the jury found that appellant suffered the prior Arizona robbery conviction. The court selected the upper term for the robbery because "defendant kept the victim hostage for over nine hours. It involved taking his

cash, his Corvette, signing over the mortgage on his home, taking his motor home."² The court selected the upper term for possession of a firearm by a felon based on appellant's record of increasingly serious felonies, and because he was dangerous and violent. On the extortion count, the court selected the upper term for the firearm enhancement because "the victim was very vulnerable." On the felon-in-possession count, it selected the upper term for the gang enhancement because appellant's "entire life is devoted to his gang as evidenced by his large gang tattoos over his entire face, his ties with the Mexican Mafia, and the fact that he did not do well on probation." Appellant concedes that his criminal record included felonies of increasing seriousness.

DISCUSSION

Sufficiency of Evidence of Possession, Use and Personal Use of a Firearm

Appellant challenges the sufficiency of the evidence to support the jury's findings that, as a felon, he possessed a firearm (§ 12021, subd. (a)(1)) and that he personally used a firearm in the commission of robbery and extortion (§§ 12022.53, subd. (b), 12022.5, subd. (a)(1).) We conclude that substantial evidence supported the jury's findings of use and possession.

Our task on review is to determine whether the record contains substantial evidence. Substantial evidence "is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt." (*People v. Hovarter* (2008) 44 Cal.4th 983, 996-997.)

For purposes of section 12021, subdivision (a)(1), a rational jury could have found that appellant personally possessed a gun based on Patrick's initial statements to police that "each" man had a gun. In Patrick's interview shortly after the crimes he said, "they showed me their guns," "they each had a gun," "here there's two guys with

² Patrick did not sign over a mortgage to his home or give appellant and Campos his motor home. Patrick was unable to take out a mortgage on his home on Sunday.

guns that demand something . . . ," and there were "[t]wo guns. One of-they-they each had a gun." He reiterated at trial that "each had one."

Appellant contends that these statements should be given little weight because at trial Patrick demonstrated confusion about who had a gun and admitted to having memory problems. The weight to be given to his conflicting statements was for the jury to determine. (*People v. Hovarter, supra*, 44 Cal.4th at p. 1010.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) Sufficient evidence supported the jury's finding that appellant personally possessed a firearm.

For purposes of sections 12022.53, subdivision (b) and 12022.5, subdivision (a), a rational jury could also have found that appellant personally used a firearm in the commission of his crimes. Appellant contends that there is no substantial evidence that he "personally used" the firearm because Patrick testified that the men did not brandish the guns. It was not necessary that appellant brandish the gun. Use of a firearm in the commission of a crime does require something more than merely being armed, but any use that aids in the commission of the crime is sufficient. (*People v. Chambers* (1972) 7 Cal.3d 666, 672.) "Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies." (*Ibid.*)

The record contains substantial evidence that appellant produced fear in Patrick by means of a firearm, causing Patrick to surrender his property and thereby aiding in the commission of the crimes. Patrick stated, "I don't want to get shot in the head. . . . So, here I give the car away then shoot, so I don't get shot in the head or-or, you know." He continued, "They showed me they had the guns," and they said, "This is serious stuff." They said that if he did not meet their demands, "It would not be pretty. You know, something would happen that would not be nice." Appellant's own recorded

statement supported a finding that the gun helped him control his victim. In a phone call about the crimes appellant said, "I had this mother fucker begging for his life."

Sufficiency of Evidence of Gang Allegations

Substantial evidence in the record supports the jury's finding that each of appellant's crimes were committed (1) "for the benefit of, at the direction of, or in association with any criminal street gang" and (2) "with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

We reject appellant's contention that there was insufficient evidence to support a finding of "specific intent" to assist in criminal conduct by gang members. Appellant committed his crimes in concert with another gang member. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) In *Villalobos*, defendant acted in concert with her boyfriend to burglarize, rob, falsely imprison and steal the car of a man in a hotel room. Because she committed the crimes in concert with her boyfriend, who was a known gang member, with knowledge that her actions would assist him in the crimes, substantial evidence supported enhancements under section 186.22, subdivision (b)(1).

Section 186.22, subdivision (a)(1) does not require specific intent to facilitate an independent crime. Appellant's federal appellate authority to the contrary does not control. (*Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103.)

Five-Year Enhancement for Prior Serious Felony (§ 667, subd. (a))

Based on a prior conviction for robbery in Arizona, the trial court doubled appellant's prison terms pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1192.7) and imposed a single five-year enhancement (§ 667, subd. (a)(1)) concurrent to the total term. We conclude that the five-year enhancement was proper, but should have been imposed consecutively.

Section 667, subdivision (a) provides a five-year enhancement to a current serious felony for each prior serious felony conviction. We reject appellant's contention

that he was denied due process of law when the information and the verdict form omitted any reference to section 667, subdivision (a). Although the information did not refer to subdivision (a), it did charge that appellant suffered the prior felony robbery conviction in Arizona and that it was serious or violent for purposes of the three strikes law. (§ 667, subds. (b)-(i).) A jury finding that a defendant has suffered a prior serious felony conviction for purposes of the three strikes law is sufficient to also support a five-year enhancement under section 667, subdivision (a) if both enhancements are based on the same prior conviction. (*People v. Williams* (2002) 99 Cal.App.4th 696, 700.) The jury's specific finding that the strike allegation was true was sufficient to also support the five-year enhancement under subdivision (a) because both were based on the Arizona conviction.

Appellant points out that in *Williams*, the jury failed to complete a verdict form for the subdivision (a) enhancement. However, the defendant was on notice that the enhancement would be sought because it was specifically alleged. Here, the subdivision (a) enhancement was not alleged, and appellant contends he had no notice or opportunity to defend against it. We disagree. Appellant was accused of serious felonies. (§ 1192.7, subd. (c)(28).)³ He was charged with a prior conviction that was serious or violent, incident to the strike allegation. Pursuant to section 667, subdivision (a), all prior serious felony convictions subject a defendant to a five-year sentence enhancement if the current offense is a serious felony. (*People v. Briceno* (2004) 34 Cal.4th 451, 458.) At the commencement of trial, the court found that the Arizona robbery would constitute a serious felony within the meaning of section 1192.7. (§ 667, subds. (b)–(i).) The jury found true the charge that appellant was convicted of the Arizona robbery. Seven weeks before the sentencing hearing, the prosecution gave express notice of its intent to seek the subdivision (a) enhancement. (§ 667, subd. (a).) With no objection from appellant, the

³ "Section 1192.7, [subdivision] (c)(28) . . . turns *any* felony offense that includes a gang enhancement under section 186.22, [subdivision] (b)(1) into a *serious* felony." (*People v. Briceno* (2004) 34 Cal.4th 451, 463.) Gang enhancements under section 186.22, subdivision (b)(1) were charged and proved true as to all three counts.

trial court then determined the legal question whether the Arizona conviction was a serious felony within the meaning of section 667, subdivision (a). Appellant had a full and fair opportunity to defend against the enhancement and he suffered no surprise.

The enhancement should, however, have been imposed consecutive to the term for the present serious felony offenses. The terms of a present felony and an enhancement pursuant to section 667, subdivision (a) "shall run consecutively." (§ 667, subd. (a)(1).) The trial court erred when it imposed the enhancement concurrently, rather than consecutively. The error results in an unauthorized sentence, which may be addressed for the first time by the reviewing court. (*People v. Turner* (1998) 67 Cal.App.4th 1258, 1269.)

Right to Jury Trial on Upper Term Factors

We reject appellant's contentions (1) that his right to a jury trial was violated by imposition of upper term sentences based on a combination of recidivist and non-recidivist factors found true by the trial judge, and (2) that ex post facto principles precluded the court from sentencing him to the upper terms under the current version of section 1170, subdivision (b), which was enacted after he committed his crimes but eight months before he was sentenced. (§ 1170, as amended by Stats. 2007, ch. 3, § 2, eff. Mar. 30, 2007.)

Appellant acknowledges that both of these contentions are contrary to state Supreme Court authority. (*People v. Black* (2007) 41 Cal.4th 799; *People v. Sandoval* (2007) 41 Cal.4th 825.) He contends those cases were wrongly decided. We are bound to follow them. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As determined by our Supreme Court in *Black*, appellant's recidivist record rendered him eligible for upper term sentences, and the trial court was permitted to engage in additional fact finding in deciding whether to impose the upper terms. (*People v. Black, supra*, 41 Cal.4th at p. 812.) As determined in *Sandoval*, section 1170 subdivision (b), amended to eliminate the midterm as the presumptive sentence, does not violate ex post facto principles. (*People v. Sandoval, supra*, 41 Cal.4th at pp. 853-857.)

The judgment is modified to reflect that the five-year enhancement imposed pursuant to section 667, subdivision (a) shall run consecutive, not concurrent, to the sentence. The judgment is otherwise affirmed.

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COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Shari K. Silver, Judge
Superior Court County of Los Angeles

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